

## NSPS OOOOa (Oil and Gas) Rulemaking Reconsideration and Tiering Issue

### Follow-up questions

N. Topinka, 12/12/17

#### - Why not issue non-concurrence, rather than not respond at all?

The workgroup was requested to send *concurrence* by COB today – no request for alternate decisions. OP is aware of the Regions/OECA's views that this should not be down-tiered and has raised them to OAQPS. The regular rulemaking workgroup call is Wednesday 12/13, so non-concurrence will be conveyed verbally then also. We could clarify via written non-concurrence that R5 is advocating for Tier 1 rather than just Tier 2.

#### - Does non-concurrence/non-response trigger something?

From EPA's ADP guidance on the tiering process:

*"If an RSC [Regulatory Steering Committee] representative/RRC [Regional Regulatory Contact] challenges the tiering level, he or she should work with the lead office to resolve the issue. If this is not possible, the OP/AA, in consultation with the lead and challenging offices' AA/RA, will determine the appropriate tier level. The OP/AA will give the final approval of the tiering form."*

\*The workgroup learned that currently, OP will agree to a Tier 2 designation but not a Tier 3.

#### - Similarly, what happens next?

Word is that "a decision has already been made to have an "informal" discussion with the Administrator on the fate of the rule." (12/12 message from Jan Galbreath of OP). Friday's 12/15 Early Guidance on the Policy Issues portion of the rulemaking may also include a discussion of the Technical Issues. It's unclear if the final tiering decision for the Technical Issues portion will happen before or after the 12/15 Early Guidance meeting. If OP recommends that the Technical Issues should not be a Tier 3, then it should follow the same timeline of rulemaking steps as the Policy Issues, with the same level of workgroup involvement.

#### - Talking points explaining why this does not fall to the level of Tier 3/routine?

The proposed action does not comport with Tier 3 criteria from EPA's ADP guidance:

- *"The action is routine..."*
  - Items up for reconsideration are broad, and are not simple technical corrections.
- *"...is not controversial..."*
  - Original rule generated over 900,000 public comments. There is a high level of external interest and litigation over changes that affect standards would not be surprising.
- *"...has broad-based support..."*
  - Until we know the actual scope of the changes, we can't comment on the scope of controversy or support, but support is unlikely to be broad-based.
- *"...or implements statutory provisions with little or no discretion."*
  - EPA has broad discretion pertaining to these potential changes. None are statutorily required to implement.
- *"Formal, extensive cross-agency interactions are not required to develop the action,"*
  - Regional staff and OECA have significant field enforcement and implementation experience.
  - Regional staff have first-hand knowledge of state rules and their expertise is necessary to avoid potential unintended conflicts.
- *"...although the lead office should work with interested offices, including the core offices, through informal discussions and/or formal agreements."*
  - In light of the above, workgroup members should have a formal role in participating in Early Guidance, Options Selection, and Final Agency Review.